

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MAY 9, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Cuba GmbH International Marketing Concept**

Serial No. 75/089,625

Cecelia M. Perry of McGlew and Tuttle for Cuba GmbH
International Marketing Concept

Cheryl S. Goodman, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney)

Before Seeherman, Walters and Bottorff, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Cuba GmbH International Marketing Concept has
requested reconsideration of the Board's March 13, 2000
decision affirming the refusal of the Examining Attorney,
pursuant to Section 2(e)(1) of the Act, to register "Shape
CD," for "a house mark for CD-Rom's with interactive
multimedia programs or interactive media software," in
Class 9, and for "booklets, pamphlets, and manuals for

explaining or describing the CD-ROM's and compact discs as mentioned above," in Class 16.

The request for reconsideration is denied.

Preliminarily, we note that applicant, in its request for reconsideration, has attempted to submit "some background as to the goods, the nature of the consumers of the goods" and certain exhibits. Trademark Rule 2.142(d) provides that the record in an application should be complete prior to the filing of an appeal. A request for reconsideration of a final decision is not a proper venue for submitting additional factual information and evidence, and this matter has not been considered.¹

Applicant concedes that "shaped CD" is a descriptive term for applicant's CD-Rom's. "It appears to be correct to state that 'shaped CD' is a descriptive term used for the goods." Request, p. 2. In fact, as we indicated in our opinion, "shaped CD" is an apt or common descriptive name for such goods. Applicant's argument that there are also other terms which are used to describe these goods does not obviate the descriptiveness of "shaped CD."

¹ Even if this material had been properly made of record during the examination of this application, it would not change our decision herein.

Nor does the fact that applicant's mark is "Shape CD," rather than "shaped CD," eliminate the descriptiveness of the mark. "Shape CD" and "shaped CD" are virtually identical in pronunciation. As we said in our previous opinion, one would have difficulty distinguishing one term from another when they are spoken in a sentence. That is, if a person were to say, "I want to order a "Shape CD," it would be difficult to know whether what was requested was a "Shape CD" or a "shaped CD."

Applicant attempts to distinguish those cases which state that the mere misspelling of an otherwise descriptive word is not sufficient to change it into a non-descriptive mark, by pointing to the fact that "shape" is a word in its own right, and has a meaning separate from that of "shaped." However, the meaning of "shape" is so close to "shaped" that consumers will regard the term "Shape CD," as used for applicant's shaped CD Rom's, as a variant or misspelling of the descriptive term "shaped CD."

Moreover, as we said before, the non-standard shape of applicant's CD-Rom's is a significant feature of its goods, such that "Shape CD" is merely descriptive even apart from the fact that "Shape CD" is a misspelling of the common descriptive term "shaped CD."

With respect to the refusal in Class 16, applicant states that its booklets, pamphlets and manuals for explaining or describing the CD's typically tell about the content of the CD or supplement the material in the CD. However, this explanation does not appear in the record, and has been presented for the first time in the request for reconsideration. As such, as noted above, the evidence is untimely. In any event, the identification of goods does not limit the written materials to descriptions of the contents of the CD's. The goods are identified as "booklets, pamphlets, and manuals for explaining or describing the CD-ROM's and compact discs as mentioned above" [i.e., CD-Rom's with interactive multimedia programs or interactive media software]. This identification encompasses written materials which explain or describe shaped CD's, and therefore "Shape CD" is merely descriptive of a feature of the written materials.

The request for reconsideration is denied.

E. J. Seeherman

C. E. Walters

C. M. Bottorff
Administrative Trademark Judges
Trademark Trial and Appeal Board